

No. 10191

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United States

*Vol 1*

Circuit Court of Appeals

*2311*

For the Ninth Circuit.

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N. N. S. MATCOVICH,

Appellant.

vs.

RICHARD NICKELL, as Collector of Internal  
Revenue for the First District of California,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division

FILED

AUG 24 1942

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PAUL PETERSEN,



No. 10191

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United States  
Circuit Court of Appeals  
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## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

Page

### Appeal:

Certificate of Clerk to Transcript of Record on .....	21
Cost Bond on.....	14
Designation of Contents of Record on (DC) .....	19
Notice of Adoption of Points on (CCA)..	22
Notice of .....	13
Statement of Plaintiff's and Appellant's Points on (DC).....	16
Certificate of Clerk to Transcript of Record..	21
Complaint .....	2
Cost Bond on Appeal.....	14
Designation of Contents of Record on Appeal, Plaintiff's and Appellant's (DC).....	19
Judgment of Dismissal.....	12
Motion to Dismiss.....	10
Names and Addresses of Attorneys.....	1

Notice of Adoption of Points on Appeal (CCA) .....	22
Notice of Appeal.....	13
Order Granting Defendant's Motion to Dis- miss and Denying Injunctive Relief to Plaintiff .....	11
Order to Show Cause.....	9
Statement of Plaintiff's and Appellant's Points on Appeal (DC).....	16

NAMES AND ADDRESSES OF ATTORNEYS

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Sacramento, California  
Attorney for Plaintiff and Appellant,

HON. FRANK J. HENNESSY,  
United States Attorney,

ESTHER B. PHILLIPS,  
Assistant United States Attorney,  
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7th and Mission Streets  
San Francisco, California  
Attorneys for Defendant and Appellee.

In the District Court of the United States, for the Northern District of California, Southern Division.

Civil Action File No. 22203-R

N. N. S. MATCOVICH,

Plaintiff,

-vs-

RICHARD NICKELL, as Collector of Internal Revenue for the First District of California,  
Defendant.

### BILL OF COMPLAINT

Plaintiff complains of defendant and for cause of action alleges:

#### I.

That defendant is the duly appointed Collector of Internal Revenue for the First District of California, having and maintaining his office in the City and County of San Francisco.

#### II.

This action arises under Federal Unemployment Tax Act, formerly Title IX of the Social Security Act, now Sub-chapter C of Chapter IX of the Internal Revenue Code, and the Federal Insurance Contributions Act, formerly Title VIII of the Social Security Act, now Sub-chapter A of Chapter IX of the Internal Revenue Code.

#### III.

That during the period 1938, 1939, and 1940 plain-



tiff conducted a dance hall in the City of Sacramento, State of California. [1\*]

## IV.

That during said period in conducting said dance hall plaintiff licensed certain ladies to use said premises for the purpose of dancing.

## V.

That the defendant has demanded from plaintiff the sum of \$3,204.65, together with a five per cent penalty and interest on said sum at the rate of seven and one-half per cent per annum from the 7th day of March, 1941 to the 15th day of June, 1942, as a tax under said Federal Insurance Contributions Act, and the sum of \$5,066.79 for contributions under and pursuant to said Federal Unemployment Tax Act, together with the sum of \$253.54 penalty and interest on said sum of \$5,066.79 at the rate of seven and one-half per cent per annum from the 21st day of July, 1941, to date; that said defendant bases his demand for said respective sums on the claim that said ladies were employees of said plaintiff.

## VI.

That said ladies are not employees of plaintiff, and were never at any time during said period, employees of plaintiff; that said ladies are not employees of plaintiff and do not come within the terms of said Federal Insurance Contributions Act or said Federal Unemployment Tax Act, in that said Acts and Tax assessed thereunder are based upon the

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

relation of employer and employee; that the relationship which existed between plaintiff and said ladies during said period was one of licensor and licensee, and that said ladies during said period of time were independant contractors. And in this connection, plaintiff alleges that each of said ladies prior to dancing in plaintiff's place of business entered into a license agreement, a copy of which is in the following words and figures:

"This is to certify that . . . is hereby granted the privilege of engaging in dancing with patrons of the undersigned at 416-18 K Street, Sacramento, California, in consideration of the payment to the undersigned of a portion of the money earned by her as mutually agreed upon.

In granting this privilege, it is the intent hereof that licensee shall not become an employee of the undersigned and that she shall not become subject to the control of the undersigned.

Licensee agrees to abide by all regulations established [2] by the undersigned in the operation of his business.

Dated\_\_\_\_\_ 19\_\_\_\_\_

RIO BALL ROOM

416-K Street,

Sacramento, California

By

Accepted:

By

"

That no other agreement of any kind was ever entered into between said plaintiff and said ladies. That said ladies during said period danced in said premises under the license issued to them by plaintiff and by and under no other agreement or arrangement.

#### VII.

That the said Tax Assessments are erroneous, unlawful and void, because, as hereinabove pointed out, the relationship of employer and employee did not exist between plaintiff and said ladies during said period, and therefore the action by the defendant is attempting to levy a tax in this instance is arbitrary and an unlawful exercise of administrative authority.

#### VIII.

That on or about the 19th day of May, 1942, plaintiff filed claim for abatement of said respective taxes and assessments, basing his claim for abatement on the ground that there was no tax, assessment or contributions due because the relation of employer and employee did not exist; that said claim for abatement was denied. That said defendant is preparing to and will unless restrained and enjoined by this Court seize and distrain plaintiff's property under the pretended authority of the said Tax Assessments. That said tax is erroneous, unlawful and void.

#### IX.

That plaintiff has no plain, speedy or adequate remedy at law for the reason that his action to determine the legality of the said tax assessment may

not be brought except upon payment of the said tax assessment and suit to recover it back. That plaintiff is unable to pay the said sum of \$8,271.45 without working serious and irreparable damage to his property and business, [3] which could not subsequently be remedied by the recovery of this tax by suit after payment. That if defendant siezes and distrains the property of plaintiff and sells the same plaintiff's entire business will be lost and destroyed, which will result in irreparable damage to him.

#### X.

That during all of said period plaintiff claims for the reasons herein stated that there was no tax due and therefore did not pay any tax, nor did he make any deductions from the moneys received by said ladies from persons dancing with them as required by said Acts, if the relation of employer and employee existed, relying upon the following facts and circumstances:

All of said ladies desiring to dance in his said premises entered into the license agreement, a copy of which is hereinbefore set out, prior to their dancing in said premises. That pursuant to said agreement said ladies so desiring to dance therein were licensees only, and not employees. That more than sixty ladies annually have executed and operated under said license agreement during the years 1939, 1940 and 1941.

That plaintiff is informed and verily believes and therefore alleges that no claim of any kind was ever filed by any of said ladies under and pursuant to

the provisions of said State Employment Act or Social Security Act, until during the year 1939 when one Mary C. Mosier filed an application for compensation under the State Unemployment Act based upon services alleged to have been performed from October, 1938, to February, 1939. That plaintiff resisted said application. Said application was denied by the Adjustment Unit of the Division of Unemployment Insurance of said State of California on the ground that the employer and employee relation did not exist. That thereupon said Mary C. Mosier took an appeal to the Appeals Tribunal of the California Employment Commission; that the Appeal Officer of said Commission, on the 8th day of October, 1940, affirmed the determination of the Adjustment Unit of the Division of Unemployment Insurance, which held that Mary C. Mosier was not an employee.

That said California Employment Commission, on the 13th day of January, 1939, filed an action in the Superior Court of the State of California, in and [4] for the County of Sacramento, against plaintiff herein, for the purpose of recovering contributions under and pursuant to the said Unemployment Act based upon taxable wages alleged to have been earned by said ladies during the years 1936, 1937, and the first quarter of 1938, on the theory that the employer and employee relation existed between plaintiff and said ladies. That Honorable Peter J. Shields, before whom said action was tried, on the 24th day of January, 1940, held that the said Cali-

ifornia Employment Commission was not entitled to recover because the relation of employer and employee between said plaintiff herein and said ladies did not exist.

That during the years 1939, 1940 and 1941 no proceedings were taken to collect the tax assessment for the years 1939, 1940 and 1941.

That by reason of the foregoing circumstances, it would be unjust and inequitable to compel plaintiff to pay said taxes and assessments until such time as it is determined that said taxes and assessments are justly due from plaintiff.

Wherefore, plaintiff prays judgment against said defendant that there is no tax or assessment due under either of said Acts as claimed by defendant, and that defendant, his deputies, agents, representatives and employees, be enjoined and restrained from assessing, levying or collecting any of said taxes, and from doing any acts of any nature calculated to enforce or satisfy the above mentioned tax or assessments until such time that the above entitled Court shall have determined whether said taxes or assessments have been properly levied or assessed, and for such further relief as may be just and proper in the circumstances, and for costs of suit.

Dated: June 9th, 1942.

R. H. SCHWAB

Attorney for Plaintiff [5]

(Duly verified.)

[Endorsed]: Filed Jun. 9 1942 [6]

[Title of District Court and Cause.]

### ORDER TO SHOW CAUSE

The plaintiff, N. N. S. Mateovich, having filed herein his verified Bill of Complaint, praying that the above named defendant, his agents, representatives and servants, and each of them, be restrained and enjoined from assessing, levying or collecting a certain tax assessment against said plaintiff, which said tax assessment is fully described in said Complaint, and from doing any acts of any nature calculated to enforce or satisfy the above mentioned tax assessment during the pendency of this action;

It Is Therefore Ordered that said defendant, Richard Nickell, as Collector of Internal Revenue of the First District of California, appear before this Court in the Courtroom, located in the Post Office Building on 7th and Mission Streets, in the City and County of San Francisco, State of California, at 10:00 o'clock on the 22nd day of June, 1942, then and there to show cause, if any he has, why he should not be restrained and enjoined [7] during the pendency of this action from doing or causing to be done, any act or thing designed to enforce, collect or satisfy a certain tax assessment made by defendant Richard Nickell, as Collector of Internal Revenue, against plaintiff as an employer, etc., said assessment being in the amount of \$8,271.45.

It Is Further Ordered that a copy of the Bill of Complaint herein and of this Order, be served on each of the Defendants herein.

Dated: June 9th, 1942.

MICHAEL J. ROCHE

Judge of the United States  
District Court.

Return of Service of Writ (attached to Copy).

[Endorsed]: Filed Jun. 9 1942 [8]

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[Title of District Court and Cause.]

### MOTION TO DISMISS

Now Comes the defendant above named and moves the Court for its order dismissing the complaint filed herein on the following ground:

That suit to enjoin or restrain the assessment or collection of taxes is expressly forbidden by the provisions of Section 3653 of the U. S. Internal Revenue Code, which reads:

“(a) Tax.—Except as provided in Sections 272 (a), 871 (a) and 1012 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

“(b) Liability of Transferee or Fiduciary,—No Suit shall be maintained in any court for the purpose of restraining the assessment or collection of (1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any income, war-profits, excess-profits, or state tax. (2) the amount of the liability, at law or in equity, of a transferee



of property of a donor in respect of any gift tax, or (3) the amount of the liability of a fiduciary under section 3467 of the Revised Statutes (U.S.C. Title 31, Sec. 192) in respect of any such tax." [9]

That the complaint fails to show legal reasons for the court to disregard the provisions of Section 3653, above quoted.

FRANK J. HENNESSY,  
United States Attorney,  
ESTHER B. PHILLIPS,  
Assistant United States  
Attorney.

(Receipt of service)

[Endorsed]: Filed June 22, 1942 [10]

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[Title of District Court and Cause.]

ORDER GRANTING DEFENDANT'S MOTION  
TO DISMISS AND DENYING INJUNC-  
TIVE RELIEF TO PLAINTIFF.

The order to show cause why the Plaintiff's prayer for injunctive relief should not be granted, coming on for hearing June 22, 1942, the plaintiff appearing by his attorney, R. H. Schwab, and the defendant appearing by his attorney Frank J. Hennessy, United States Attorney for the Northern District of California, represented by Esther B. Phillips, Assistant United States Attorney, and the defendant having moved for dismissal of the

complaint and the prayer of the plaintiff for injunctive relief, and the defendant's prayer for dismissal of the complaint having been orally heard, and the Court having considered the authorities and argument of counsel, it is Hereby Ordered, Adjudged and Decreed that the defendant's motion to dismiss the complaint be granted and the plaintiff's prayer for injunctive relief be and the same is hereby denied.

Dated: June 22, 1942.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Jun 22, 1942. [11]

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In the Southern Division of the United States  
District Court for the Northern District of  
California.

No. 22203-R

N. N. S. MATCOVICH,

Plaintiff,

vs.

RICHARD NICKELL, as Collector of Internal  
Revenue for the First District of California,  
Defendant.

### JUDGMENT OF DISMISSAL

The Court having heretofore, on the 22nd day of June, 1942, granted defendant's motion to dis-

miss and having this day ordered that a judgment of dismissal be entered herein;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the plaintiff take nothing by this action and that the defendant go hereof without *day*.

Judgment entered this 30th day of June, 1942.

WALTER B. MALING

Clerk

[Endorsed]: Filed Jun. 30, 1942. [12]

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[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Honorable Michael J. Roche, Judge of the  
Above Entitled Court:

The above named plaintiff, feeling himself aggrieved by the judgment of dismissal and the order discharging the order to show cause made and entered in the above-entitled cause on the 3rd day of June 1942, does hereby appeal from said judgment of dismissal and order discharging said order to show cause, Circuit Court of Appeals for the Ninth District, for the reason specified in the statement of plaintiff's points on appeal which are filed herewith.

And your petitioner further shows that he has filed with the Clerk of the above entitled court a bond in the sum of Two Hundred and Fifty

(\$250.00) Dollars for costs on appeal conditioned as required by law.

Dated: July 3, 1942

R. H. SCHWAB

Attorney for Plaintiff

[Endorsed]: Filed Jul. 3 1942. [13]

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[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That we, N. N. S. Matcovich, as principal, and Hartford Accident and Indemnity Company, an incorporated surety company authorized to do business in the State of California, as surety, acknowledge ourselves to be jointly indebted to Richard Nickell, appellee in the above case, in the sum of Two Hundred and Fifty (\$250.00) Dollars, conditioned, that, whereas, on the 30th day of June, 1942, in the District Court of the United States, for the Northern District of California, Southern Division, in a suit pending in that court, wherein N. N. S. Matcovich, was plaintiff, numbered on the docket thereof as Civil Action #22203-R, a decree was rendered against the said N. N. S. Matcovich, and the said N. N. S. Matcovich having appealed to the Circuit Court of Appeals of the United States, for the Ninth Circuit, at San Francisco, California, and filed copy of said notice of appeal in the office

of the clerk of the court to reverse said decree;

Now, if the said N. N. S. Matcovich shall prosecute his appeal to execute and answer all costs if he fails to make his plea good, then the above obligation to be void, else to remain in full force and virtue. [14]

It Is Further Stipulated as a part of the foregoing bond, that in case of the breach of any condition thereof, the above named District Court may, upon notice to the surety above named, of not less than ten days, proceed summarily in said suit to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefor, not in excess of the foregoing sum.

Executed, this 3rd day of July, 1942.

N. N. S. MATCOVICH

Principal

By

His Attorney.

HARTFORD ACCIDENT & IN-  
DEMNITY CO.

By ROBT. F. CULPEPPER

Attorney-in-Fact

(Duly verified.)

[Endorsed]: Filed Jul. 3, 1942. [15]

[Title of District Court and Cause.]

STATEMENT OF PLAINTIFF'S AND  
APPELLANT'S POINTS ON APPEAL

Comes now the plaintiff and appellant, N. N. S. Matcovich, and presents herewith his statement of the points on appeal on which he intends to rely on the appeal in the above entitled action :

1. The Court erred in granting the motion of dismissal of the Bill of Complaint in view of the admitted allegations in the complaint to the effect that the persons claimed by defendant to be employees of plaintiff were not and never were, during the years 1938, 1939 and 1940, for which reason no tax could be levied under the Federal Contributions Act or the Federal Unemployment Tax Act.

2. The Court erred in dismissing said bill of complaint in view of the admitted fact before the Court as alleged in the complaint that the relation which existed between the plaintiff and the persons whom defendant claimed were employees, were in fact licensees and independent contractors.

3. That the Court erred in dismissing said bill of complaint in that the contract set forth in said complaint definitely fixed the relations between plaintiff and said alleged employees as that of licensor and licensee. [16]

4. That the Court erred in dismissing said complaint in that a contract set forth in said complaint which grants to said alleged employees the privilege of dancing in plaintiff's place of business and that

for said privilege, said alleged employees pay therefore. That as further stated and alleged in said contract that it is the intention of said parties to said contract that said alleged employees should not become an employee of the plaintiff and further that alleged employees should not become subject to the control of said plaintiff.

5. That the court erred in dismissing said complaint in that it is alleged in said complaint that the tax assessments referred to therein were erroneous, unlawful and void. Because the relationship of employer and employee did not exist and, therefore, the action between defendant in an attempt to levy a tax was an arbitrary and unlawful exercise of the administrative authority of said defendant.

6. That the Court erred in dismissing said complaint and discharging said order to show cause in that it is alleged in said complaint that plaintiff had no plain, speedy or adequate remedy at law for the reason that plaintiff's business would be totally destroyed before an action to recover back the taxes if paid, could be brought and concluded.

7. That the Court erred in dismissing said complaint and discharging said order to show cause that to allege in said complaint that plaintiff is unable to pay sum of \$8,271.45 without working serious and irreparable damage to his property and business.

8. That the Court erred in dismissing said complaint and discharging said order to show cause in that it is alleged in said complaint that if defend-

ant siezes and distrains the property of plaintiff and sells the same, plaintiff's entire business will be lost and destroyed which will result in irreparable damage to him.

9. That the court erred in dismissing said complaint and discharging said order to show cause in that neither the defendant nor his predecessor, during the years 1939, 1940 or 1941 took any proceedings to collect said tax for said years and permitted said tax to accumulate to such an amount that plaintiff is now unable to pay the same, and that all during said period, said plaintiff relied upon the decision of the Superior Court for the State [17] of California and for the County of Sacramento, Judge Peter J. Shields presiding, that the relation of employer and employee did not exist between plaintiff and said alleged employees. That plaintiff also relied upon the decision of the Department of Employment of the State of California, holding that relationship of employer and employee did not exist between plaintiff and said alleged employees.

10. That Court erred in dismissing the Complaint and discharging the order to show cause in that the bill of complaint, which for the purposes of the order to show cause must be taken as true, stated among other matters that plaintiff had no plain, speedy or adequate remedy at law, for the reason that his action to determine the legality of the tax involved in said action may not be brought except upon the payment of said tax and suit re-



covered back. That plaintiff is unable to pay the tax, namely, \$8,271.45, without working serious and irreparable damage to his property and business, which could not subsequently be remedied by the recovery of this tax by suit after payment. That if defendant seizes and distrains the property of plaintiff, and sells the same, plaintiff's entire business will be lost and destroyed, which will result in irreparable damage to him.

11. That it would be inequitable now to permit defendant to collect said taxes before the determination that the relationship of employer and employee existed during said period.

Wherefore, plaintiff prays that the said judgment of dismissal and said order discharging said order to show cause be reversed and that proper decrees be entered on record herein *for* prayed for in his bill of complaint.

Dated: July 3, 1942.

R. H. SCHWAB

Attorney for Plaintiff

[Endorsed]: Filed Jul 3 1942 [18]

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[Title of District Court and Cause.]

PLAINTIFF AND APPELLANT'S DESIGNATION OF CONTENTS OF RECORD OF APPEAL.

Comes now the Plaintiff and Appellant, N. N. S. Matcovich, and does hereby designate the following

as the contents of his record to be included on Appeal:

## I.

The Bill of Complaint.

## II.

Order to Show Cause.

## III.

Motion to Dismiss.

## IV.

Order Discharging Order to Show Cause.

## V.

Judgment of dismissal.

## VI.

Notice of Appeal. [19]

## VII.

Statement of Plaintiff's points on appeal.

## VIII.

The designation of the contents of the Record of Appeal.

## IX.

Bond of Appeal.

Dated: July 6th, 1942.

R. H. SCHWAB

Attorney for Plaintiff

(Receipt of Service)

[Endorsed]: Filed Jul. 7 1942. [20]

District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing pages, numbered from 1 to 20, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of N. N. S. Matcovich, Plaintiff v. Richard Nickell, etc. Defendant. No. 22203-R., as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Three dollars and five cents (\$3.05) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 29th day of July A. D. 1942.

[Seal]

WALTER B. MALING  
Clerk

WM. J. CROSBY  
Deputy Clerk [21]

[Endorsed]: No. 10191. United States Circuit Court of Appeals for the Ninth Circuit. N. N. S. Matcovich, Appellant, vs. Richard Nickell, as Collector of Internal Revenue for the First District of California, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 31, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

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In the Circuit Court of Appeals of the United States in and for the Ninth District.

No. 10191

N. N. S. MATCOVICH,

Plaintiff and Appellant,

vs.

RICHARD NICKELL, as Collector of Internal Revenue for the First District of California,  
Defendant and Appellee.

NOTICE OF ADOPTION OF POINTS  
ON APPEAL.

To the Clerk of the Above Entitled Court and to Attorneys for Appellee:

Please Take Notice that Appellant does hereby adopt statement of Plaintiff's and Appellant's

points on appeal appearing in the transcript of record for all purposes on the appeal in the above entitled court.

You Are Further Notified that the Appellant hereby requests that the entire transcript be printed as certified in its entirety.

Dated: August 4, 1942.

R. H. SCHWAB

[Endorsed]: Filed Aug. 5, 1942.

